No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1943

JASPER CHAIR COMPANY, A CORPORATION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. 23–26) is reported in 138 F. (2d) 756. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 13–33)[1] are reported in 46 N. L. R. B. 528.

[1] For the convenience of the Court, the method of referring to the record adopted by the petitioner is used throughout this brief. Thus the appendix filed by the Board in the court below is referred to as "B. A.," and the appendix filed in the court below by the petitioner (there the respondent) is referred to as "R. A."

JURISDICTION

The decree of the court below (Pet. 27–29) was entered on November 27, 1943. The petition for a writ of certiorari was filed on January 20, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner, by interrogating employees regarding union affiliation, by making threatening and intimidatory remarks, by keeping union meetings under surveillance, and by discriminatorily discharging an employee, has committed unfair labor practices in violation of Section 8 (1) and (3) of the Act.

2. Whether, in the circumstances of this case, the cease and desist provisions of the Board's order are unduly broad.

3. Whether the Board may, after considering the entire record in the case, adopt as its own those findings of fact and conclusions of law of its Trial Examiner with which it agrees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 14.

STATEMENT

Upon the usual proceedings, the Board, on December 31, 1942, issued its findings of fact, conclusions of law, and order (B. A. 13–33). In accordance with its recent practice, the Board wrote its Decision and Order in memorandum (or short) form. Thus, after reciting that it had considered the Intermediate Report of its Trial Examiner, petitioner's exceptions thereto, the latter's brief in support of said exceptions, and the entire record in the case, the Board stated that it "hereby adopts the findings, conclusions, and recommendations of the Trial Examiner"; it then set forth its Order (B. A. 13–15). The Intermediate Report is attached to the Board's Decision and Order (B. A. 16–33). The pertinent facts, as found by the Board, and shown by the evidence, may be summarized as follows:[2]

In August 1941, a campaign was initiated to organize the employees of the furniture factories of Jasper, Indiana, including that of petitioner (B. A. 18–19; 98, 99, 139–140). During September, in furtherance of this campaign, the union[3] conducting the campaign held a mass meeting in the Jasper court house (B. A. 19; 149, 166).

[2] In the following statement the references preceding the semicolon are to the Board's findings; the succeeding references are to the supporting evidence.

[3] United Construction Workers Organizing Committee, Local No. 331, which later became Local 331 of the United Furniture Workers of America—both affiliated with the C. I. O. (B. A. 18, note 2; 91, 94–95, 138–140).

Thereafter, it held regular meetings and social affairs at a downtown hall, and attempted to augment its membership and encourage attendance at its meetings by distributing literature and making other public announcements (B. A. 19, 20, 23–24; 92, 146, 154, 155).

A day or two after the Union's initial mass meeting, petitioner's superintendent, William Schwinghamer, approached an employee at work and after accusing him of having attended the meeting, stated, "If you fellows ain't satisfied with what you are getting around here, you can go somewhere else and work" (B. A. 19; 39, 149–150). As the Union's organizational efforts continued, Superintendent Schwinghamer interrogated three other employees respecting their union sympathies and activities, and strongly expressed his hostility to the Union. He indicated obvious disgust with one of these employees, demanded to know why another was "an awfully strong union member," and warned the third not to "start any trouble in here." (B. A. 19–20, 24–25; 163–165, 154–155, 160–162, 166–167, 172–173.) Another of petitioner's supervisors, Foreman Winkler, denounced the Union to a subordinate employee, accusing it of being linked with Communism (B. A. 20; 163–164, 176). On other occasions, petitioner attempted to discourage attendance at union meetings and to prevent solicitation of its employees by the Union, by resorting to open surveillance of union meetings, and by explicit

threats and other hostile remarks (B. A. 20–24; 35, 52–54, 114–117, 133–138, 142–145, 147–148, 106–107, 150–151, 155–156, 162, 91–93).

The Board found that petitioner "has engaged in a course of action for the purpose of interfering with the self-organization of its employees by interrogating employees regarding union affiliations; by making derogatory remarks regarding the Union; by intimidating and attempting to intimidate employees and other persons participating in union activities; by interfering with union organization and activities; and by keeping under surveillance union meetings and activities * * *" (B. A. 25), and thereby "has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" (B. A. 26).

Leo Lannan, who had been continuously employed by petitioner for about 17 years (B. A. 26; 100), joined the Union in November 1941, and thereafter attended meetings and solicited membership for the Union (B. A. 21, 28; 104–106, 141–142, 156–157, 167). Superintendent Schwinghamer promptly confronted Lannan with the fact that he knew of Lannan's union activities, and made his disapproval of them plain by denouncing the Union, by stating that he "had a notion to fire" Lannan, and by threatening to make it "damn hard" on him (B. A. 21; 106–107, 150–151).

Lannan, who was 50 years old, operated various machines in petitioner's plant; this required

some skill and involved light work (B. A. 21–22; 47, 100–103, 110, 117, 185). However, shortly after his activities in the Union had come to petitioner's notice, the latter made good his threats to "make it hard on him" and to discharge him. On February 17, 1942, Schwinghamer arbitrarily ordered Lannan to leave his accustomed work in the plant and to go out into the yard to help unload lumber. The day was cold, and Lannan, who had been working near a heater in the plant, was lightly dressed. In addition, Lannan was still ill from the effects of dental surgery which he had undergone a few days earlier. When, therefore, he was ordered to transfer to arduous laboring work which he had not done for 5 years past, and which was customarily done by younger and less skilled employees, he pointed out that his physical condition and inadequate clothing made it impossible for him to carry out these instructions. (B. A. 21–22, 27–28; 41, 103, 107–110, 117, 121–122, 125–126, 128, 130–131, 151–152, 160, 183–184.) Schwinghamer thereupon consulted petitioner's president, and then summarily handed Lannan his pay check saying, "Now, by God, you are fired. Go up and let Andy Bettag [president of the Union] get you a job" (B. A. 22; 40, 108, 138, 145–146, 216).

The Board found that "both Schwinghamer's request on February 17 that Lannan go into the yard and his subsequent discharge of Lannan because he tried to explain that he could not,

stemmed from Schwinghamer's resentment against Lannan because of Lannan's activities on behalf of the Union," and that petitioner, by such discharge and its subsequent refusal to reemploy him, discriminated in regard to the hire and tenure of employment of Lannan, and thereby discouraged membership in the Union, and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (B. A. 28–29).

Upon findings that petitioner's conduct as above summarized constituted unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (B. A. 30–31), the Board ordered petitioner to cease and desist from the unfair labor practices found, from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act, to offer reinstatement with back pay to Lannan, and to post appropriate notices (B. A. 14–15).

On March 17, 1943, the Board filed in the court below its petition for enforcement of its order against petitioner (B. A. 1–4). On November 6, 1943, the court handed down its opinion (Pet. 23–26), and on November 27, 1943, entered its decree (Pet. 27–29), enforcing the Board's order in full.

ARGUMENT

1. Petitioner's contention (Pet. 4, 9–11, 17–19) that the Board's findings of unfair labor practices

are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3 to 7) affords full support for the challenged findings, as the court below held (Pet. 26).

2. Petitioner contends (Pet. 11–12, 19–21) that the provision of the order which restrains it from in any manner infringing the rights guaranteed to employees under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express Publishing* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S. at 436). In that case, there was only an isolated refusal to bargain collectively. In the instant case, proof exists of numerous independent violations of Section 8 (1) which were of the same type as the order prohibits. This circumstance of itself suffices to support the order. Moreover, in this case, the violations were so numerous and varied, and demonstrated such open hostility to the Union as to furnish ample basis for the belief that other violations were likely to occur unless restrained—a second sufficient ground for the broad type of cease and desist order. Provisions identical to the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *Na-*

tional Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioner were presented to this Court by the employers in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706; and *Butler Bros.* v. *National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, November 22, 1943, No. 274, present Term.

3. Petitioner asserts also that the order is invalid because the Board's adoption of the findings and conclusions of its Trial Examiner amounted to a failure on the Board's part to state its findings of fact as is required by Section 10 (c) of the Act (Pet. 3, 8–9, 15–17). The style of the Decision and Order in the instant case follows a recently inaugurated practice of the Board to issue "short-form" decisions expressly adopting those findings and conclusions of the Intermediate Report which accord with the Board's own determination of the issues after it has studied the record and the exceptions and briefs, and has afforded the parties an opportunity for oral

argument before it.[4] This change from its former elaborate, independently stated findings of fact was effected primarily to expedite the disposition of cases, in response to the increasing case load occasioned by the rapid expansion of defense industries since the advent of the war.[5] In making the change, the Board was guided by the recommendations of the Attorney General's Committee on Administrative Procedure,[6] which after a survey of Board practices suggested that it would be desirable for the Board "in many cases to adopt as its own the trial examiner's findings and conclusions, subject, of course, to such alterations as might appear to be necessary in the light of the parties' arguments to the Board."[7]

When, as here, the Board agrees with and adopts the findings of the Trial Examiner *in toto*, it manifestly does not, contrary to petitioner's contention (Pet. 16), thereby delegate its fact-finding function. Because it thus "adopts the

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[4] *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, United States Government Printing Office, Washington, D. C., pp. 8–9; *Seventh Annual Report*, pp. 9–13.

[5] See *Sixth Annual Report*, pp. 1–4; *Seventh Annual Report*, pp. 9–10.

[6] *Final Report of the Attorney General's Committee on Administrative Procedure, January 24, 1941* (Superintendent of Documents, Washington, D. C.); *Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure*, Part 5.

[7] *Monograph of the Attorney General's Committee*, pp. 22–29.

exact or substantial phraseology of others, it does not follow that [the Board] has abdicated in favor of mental processes extrinsic [to its own]." *National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263, 266 (C. C. A. 3). That the Board, in fact, has not, by means of the "short-form" decision, attempted to shirk its responsibility, is at once apparent from a cursory examination of the decisions already issued in this form. These reflect a painstaking decision-making process, indicating clearly in each case the respects in which the Trial Examiner's findings are adopted, rejected, or modified as they accord or disagree with the Board's own determination of the issues.[8] Furthermore, as the court below pointed out (Pet. 25), "where the Board declares that it has considered 'the entire record in the case' it cannot be said that the Board did not consider the evidence, and we must accord its decision the presumption of regularity to which it is entitled, *Morgan* v. *United States*, 298 U. S. 468, and *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. (2d) 246 [(C. C. A. 7)]."

Petitioner insists, however, (Pet. 17), that "under no circumstances should the National

[8] See, *e. g.*, *Matter of Idaho Refining Co.*, 47 N. L. R. B. 1127; *Matter of Thompson Products, Inc.*, 46 N. L. R. B. 514; *Matter of Pacific Olive Co.*, 46 N. L. R. B. 1; *Matter of Bear Brand Hosiery Co.*, 46 N. L. R. B. 609; *Matter of Armour Fertilizer Works, Inc.*, 46 N. L. R. B. 629; *Matter of Mt. Clemens Pottery Co.*, 46 N. L. R. B. 714.

Labor Relations Board be permitted to deviate one bit from the strict statutory requirement that it shall state its findings." But this ignores the fact noted by the court below (Pet. 25), that "no special form or style in which the findings shall be cast is prescribed in the Act or in the Board's Rules * * *." Since petitioner does not even claim that its rights were in any way impaired or prejudiced by the Board's use of the "short-form" decision, or that the requirements of due process demand that the Board should have re-written, instead of having adopted by reference, findings with which it wholly agreed, its position is unduly technical, and its contentions raise no issue reviewable here. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 431–432; *Morgan* v. *United States*, 304 U. S. 1, 17–18.

That the other circuit courts of appeal are uniformly in accord with the position of the court below, is plain, for of the "short-form" decisions thus far issued by the Board which have come before the courts, there has been no instance in which such an order has been refused enforcement on the ground urged herein by petitioner, or on any similar ground.

CONCLUSION

The decision below, sustaining the Board's order, is correct, and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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